



May 30, 2012

Ms. Jane M. Hicks
Division Chief, Regulatory Division
U.S. Army Corps of Engineers
1455 Market Street, 16th Floor
San Francisco, California 94103-1398

Mr. Jason Brush
Manager, Wetlands Office
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105

Re: DMB Redwood City Saltworks Salt Plant, Redwood City, San Mateo County, California

Dear Ms. Hicks and Mr. Brush:

In accordance with U.S. Army Corps of Engineers (Corps) Regulatory Guidance Letter (RGL) 08-02, DMB Redwood City Saltworks (Saltworks)¹ – previously requested, and the Corps issued, a preliminary jurisdictional determination (PJD). The PJD covered approximately 1,365 acres of industrial salt production facilities (effectively, all areas interior to the perimeter levee system, herein referred to as Salt Plant) and approximately 113 acres of adjacent areas in and around Redwood City, San Mateo County, California.² Collectively, this 1,478 acres was the PJD area.

That request was made as the Saltworks team was pursuing a particular vision for redevelopment, reuse, and restoration of the Salt Plant with the City of Redwood City. As explained in greater detail below, Saltworks is no longer pursuing that project application and is,

¹ Saltworks is a venture whose principals are DMB Pacific Ventures, LLC and Westpoint Slough, LLC, an affiliate of Cargill, Incorporated. The real property at the Salt Plant is owned by Cargill Point, LLC, an affiliate of Cargill, Incorporated.

² Letter from David C. Smith, DMB Redwood City Saltworks, to Jane Hicks, Chief, Regulatory Division, U.S. Army Corps of Engineers (Nov. 12, 2009); Letter from Jane M. Hicks, Chief, Regulatory Division, U.S. Army Corps of Engineers, to David Smith, DMB Redwood City Saltworks (Apr. 14, 2010). The PJD covered both the Salt Plant and the adjacent areas, a total of approximately 1,478 acres.

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instead, contemplating a dramatically reduced development proposal confined to the most historically disturbed portion of the Salt Plant.

In pursuing this revised and reduced proposal, Saltworks now withdraws the PJD. Instead, Saltworks and Cargill now seek a formal, legally binding, and final jurisdictional determination under the Rivers and Harbors Act (RHA) and the Clean Water Act (CWA) for the 1,365 acre Salt Plant. The Corps has the authority to make the RHA jurisdictional determination.³ We request that the CWA jurisdictional determination be made by the U.S. Environmental Protection Agency (EPA) pursuant to the “Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act” (Jan. 19, 1989) (1989 MOA). Finally, as explained below and in the attached jurisdictional submission, we set forth the reasons why the Salt Plant is not subject to either the RHA or the CWA.

Local Processing of the Proposed Restoration and Reuse of the Saltworks Salt Plant

Well before bringing forward any specific proposal for the restoration and reuse of the Salt Plant, the Corps, EPA, and other agencies strongly encouraged the Saltworks team to engage Redwood City residents and elected officials regarding any proposal for the future of the Salt Plant. We agreed. Both then and now, that foundation of grassroots outreach has been and remains the foundation of the evolving proposal for the Salt Plant.

The initial proposal, filed with the City in May 2009, was the product of nearly two years of outreach and public engagement involving community forums, planning charrettes, and other means of input. The Saltworks team documented over 10,000 comments and suggestions during this period which informed and guided the first project application to the City. Titled the “50/50 Balanced Plan,” this application proposed using half of the Salt Plant for development and the other half for open space and restoration uses.

The 50/50 Balanced Plan proposed a transit-oriented, mixed-use community consisting of a maximum of 12,000 residential units; up to 1,000,000 square feet of commercial office uses; 140,000 square feet of neighborhood commercial and personal services uses; over 40 acres devoted to schools including four elementary school sites, a middle school site, and a high school site; community facilities consisting of a branch library, fire station, 4-H club farm and community garden; and approximately 794.5 acres of open space including creation of approximately 476 acres of tidal marsh habitat. Visually, the plan had a prominent crescent configuration that extended across most of the Salt Plant, wrapping around the core restoration area.

³ 33 U.S.C. § 403; 33 C.F.R. § 329.14(b).

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The City conducted extensive study and analysis of the May 2009 proposal. Additionally, during much of 2011, the City carried out an extensive “scoping” process pursuant to, though far exceeding the requirements of, the California Environmental Quality Act. That process included four topical workshops, a planning commission hearing, and a City Council hearing. That process produced hundreds of comments on the proposed plan from Redwood City residents, regional stakeholders, and regulatory agencies.

In light of the tremendous amount of public participation and thoughtful feedback, the Saltworks team began a thorough re-evaluation of the project proposal. In fact, because it was clear that the reconsideration would involve significant revisions to central aspects of the proposed project, the Saltworks team officially notified the City in November 2011 to stop all work on and consideration of the pending 50/50 Balanced Plan application. Ultimately, that application was officially withdrawn from the City in May 2012.⁴

Saltworks has not yet submitted a revised project proposal to the City. However, it has notified the City that the new project proposal will be a dramatic departure from the prior plan. Specifically, all proposed development will be confined to a much smaller footprint, roughly half the disturbance area proposed in the May 2009 project. Further that disturbance area will be limited to and confined within the most historically filled and manipulated area of the Salt Plant. The attached jurisdictional submittal, Attachment B, and the “Early History Report,” Exhibit 5 thereto, lay out that disturbance history in detail.

In addition to the development footprint being confined to the area of greatest historic disturbance, it also is wholly contained within the City’s “Urban Reserve” designation in its General Plan. The Urban Reserve designation identifies “land to be preserved for future use to *expand the limits of the urbanized area of the City.*” Redwood City General Plan, The Built Environment, Urban Form and Land Use, at BE-41 (adopted October 11, 2010) (emphasis added). This much-reduced and consolidated development footprint significantly expands the area and opportunities available for restoration and habitat creation.

Saltworks will not proceed with the PJD.

As you know, RGL 08-02 establishes that a PJD is not a “legally binding determination . . . regarding whether CWA/RHA jurisdiction exists” over a particular location.⁵ Rather, it is a tool available at the option of the applicant to “set aside questions regarding CWA/RHA jurisdiction .

⁴ Letter from John Paul Bruno, Redwood City Saltworks, to the Honorable Alicia Aguirre, Mayor, City of Redwood City (May 4, 2012) (formally withdrawing the 50/50 Balanced Plan application), included here as Attachment A.

⁵ U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02 at 3 (June 26, 2008), *available at* <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf>.

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. . . usually in the interest of allowing the landowner or ‘affected party’ to move ahead expeditiously to obtain a Corps permit authorization where the party determines that it is in his or her best interest to do so.” *Id.* Under RGL 08-02, a PJD may be used “even where initial indications are that the water bodies or wetlands on a *site may not be jurisdictional*,” as is the case with the Salt Plant. *Id.* (emphasis added). Moreover, “a recipient of a preliminary JD can . . . request and obtain an approved JD if that later becomes necessary or appropriate during the permit process” *Id.*

As we noted in our prior letters, Saltworks and Cargill consistently have maintained that the Salt Plant is not subject to federal jurisdiction under either the CWA or the RHA. By the terms of RGL 08-02, a landowner’s election to proceed under a PJD is voluntary and subject to rescission at the behest of the landowner. Indeed, the Corps noted in its April 14, 2010 letter issuing the PJD that Saltworks and Cargill could request an approved jurisdictional determination at any time. Accordingly, Saltworks and Cargill no longer elect to proceed with the PJD and now seek a formal, legally binding, final determination of RHA and CWA jurisdiction over the Salt Plant from the regulatory agencies. This determination will assist Saltworks and Cargill in assessing alternative future uses of the Site and in working with State, regional, and local officials as well as other stakeholders.

The Salt Plant is not subject to CWA or RHA jurisdiction.

As explained in the attached submission, Redwood City Approved Jurisdictional Determination Submission (May 30, 2012), Attachment B, the Salt Plant is not subject to federal jurisdiction under either the RHA or the CWA. Major portions of the Salt Plant have been in agricultural and industrial use as early as the 1860s. The present-day Salt Plant was defined and constructed pursuant to a United States War Department permit issued under the RHA in 1940.⁶ Although that construction fully and finally severed the entire Salt Plant from San Francisco Bay, the western-most portion of the Salt Plant had a history of disturbance and fill for decades predating that permit.

As to RHA, the Salt Plant is not subject to jurisdiction because it is not subject to the ebb and flow of the tide, and it does not constitute navigable waters capable of transporting interstate or foreign commerce. With the exception of two sloughs—First Slough and Westpoint Slough—the Corps never asserted RHA jurisdiction over the Salt Plant. Indeed, a 1931 Coast and Geodetic Survey Sheet reflects the conversion to fast land of the vast majority of the Salt Plant west of what was First Slough. Today, the entire Salt Plant is surrounded by levees which sever any connection to San Francisco Bay. The 1940 War Department permit authorized the damming

⁶ At the time of the 1940 permit, the Corps was part of the United States War Department. The War Department was dissolved in 1949 and the Corps is now part of the United States Department of the Army, a military department within the United States Department of Defense.

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and leveeing of First Slough and the construction of levees along Westpoint Slough around the perimeter of the Salt Plant. The effect of these permitted actions was to cut off all remaining tidal flow to the Salt Plant so that the interior areas could be converted to saltmaking operations. In sum, the Corps historically claimed only limited RHA jurisdiction over the Salt Plant, and what jurisdiction it may have had was extinguished by the 1940 permit.

As to CWA, the Salt Plant is not subject to jurisdiction because it was filled and permanently converted into an industrial saltworks facility prior to the passage of the CWA in 1972. The Salt Plant had none of the characteristics of “waters of the United States” at the time the CWA took effect. The long and dynamic history of disturbance and fill of the western-most portion of the Salt Plant is documented in the attached jurisdictional submission with its accompanying Early History Report. Further, with the construction of the levees, the remainder of the Salt Plant was hydrologically separated from San Francisco Bay. Moreover, the Salt Plant today does not constitute “waters of the United States” under Corps and EPA regulations or under controlling CWA case law, including case law from the United States Court of Appeals for the Ninth Circuit.

Saltworks seeks a case-specific CWA jurisdictional determination from EPA.

Because any CWA jurisdictional determination involving the Salt Plant will present important, long-disputed legal and policy issues, and given EPA’s extensive involvement with San Francisco Bay salt production facilities over the past decade, Saltworks requests that EPA make a case-specific jurisdictional determination for the Salt Plant pursuant to the 1989 MOA. Under the MOA, EPA can make a final determination of the jurisdictional scope of waters of the United States where significant issues are anticipated and where clarifying guidance is likely to be needed. Those circumstances exist here.

The CWA jurisdictional status of Cargill’s saltmaking operations around the Bay has been the subject of repeated litigation over the past 40 years.⁷ But none of the cases have addressed or resolved the issue of jurisdiction at the Salt Plant. Here, the determination of jurisdiction will necessarily require resolution of numerous important policy and legal issues, such as:

- The legal effect of the lawful conversion of the entire Salt Plant to fast land under a 1940 RHA permit prior to enactment of the CWA;
- Whether brines that are intermediate industrial products and that, when discharged into “waters of the United States” are regulated by EPA as statutory “pollutants” under the CWA, can also be “waters of the United States;” and

⁷ From 1971 to 2007, there were at least 18 cases addressing the jurisdictional status of the various Cargill saltmaking operations around the Bay.

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- The application of CWA jurisdiction, if any, to an isolated site following *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006).

Further, principles of economy and efficiency warrant EPA's involvement on the front end of this analysis. We are certainly aware of and sympathetic regarding the significant workload shouldered at EPA Region IX by just a few professionals in the Water Division. But given the history of disagreement regarding this and other Cargill facilities in San Francisco Bay, involvement by EPA seems inevitable. Up-front involvement and direction from the ultimate authority on CWA issues would certainly appear to be in all parties' interest.

Moreover, EPA has a long history of involvement with the CWA jurisdictional questions related to Cargill's saltmaking facilities, including at the Napa Plant Site. EPA is thoroughly familiar with saltmaking operations, including in particular the Redwood City Salt Plant. Indeed, EPA was a critical player in the 2003 sale and donation of 16,500 acres of Cargill saltmaking facilities around San Francisco Bay, which specifically involved, but did not resolve, the jurisdictional status of the Salt Plant. Accordingly, given the history and questions presented by the Redwood City Salt Plant, EPA should make a case-specific CWA jurisdictional determination.

Conclusion

The Saltworks team has been exploring potential future uses for the Salt Plant since 2006. The significant amount of public engagement – both in support and opposition – testify to the pivotal importance of this Salt Plant. Its size, location, and characteristics afford an unparalleled opportunity for impacting both the region's dire lack of housing as well as providing both the land and financial resources to accomplish substantial wetlands restoration. The varied and extensive history of disturbance and fill at the Salt Plant warrant a thoughtful consideration of all the dynamics this Salt Plant presents. We look forward to working with you as you complete the Salt Plant's jurisdictional determination. Please contact me if you have any questions regarding our request or the information contained in or attached to it. Thank you very much for your prompt attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "David C. Smith".

David C. Smith, Esq.
Senior Vice President
DMB Redwood City Saltworks

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cc: Melissa Scianni, EPA Region IX
 Hugh Barroll, EPA Region IX
 Katerina Galactos, EPA Region IX
 Cameron Johnson, USACE, San Francisco District
 Blake Lyon, Senior Planner, City of Redwood City
 Pamela Thompson, City Attorney, City of Redwood City

Attachments